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In The
Supreme Court of the United States

CORNELL P. GUNTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit erred by failing to hold that

   a. The search warrant was based upon allegations of an unreliable confidential information and

   b. The search warrant did not show a sufficient nexus between the alleged criminal activity and the residence of Mr. Gunter to establish probable cause.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

Appendix A

1. Order of the United States District Court of the Eastern District of Tennessee denying Defendant/Appellant Cornell P. Gunter's Motion to Suppress, August 14, 2006.

2. United States Court of Appeals for the Sixth Circuit's Order affirming the finding of the trial court in its denial of the Defendant/Appellant Cornell P. Gunter's Motion to Suppress Search Warrant, dated February 20, 2008.

BASIS FOR JURISDICTION BY THE UNITED STATES SUPREME COURT

On August 14, 2006, the Honorable Curtis L. Collier affirmed the magistrate's denial of defendant/appellant Cornell P. Gunter's written Motion to Suppress. The defendant subsequently entered a conditional plea under Fed. R. Crim Proc 11(a)(2) and 11(e)(1)(c) and received a sentence not to exceed 240 months, reserving the right to appeal the specific issues preserved in his initial Motion to Suppress. The Defendant remains incarcerated through his appeal process.

On February 20, 2008, the United States Sixth Circuit Court of Appeals affirmed the ruling of the trial court.

Pursuant to Rule 10 of the Rules of the Supreme Court, jurisdiction exists to review on a writ of certiorari when the United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of appeals on an important matter. Further there is jurisdiction pursuant to Supreme Court Rule 10 when the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by lower court, so as to allow the United States Supreme Court to exercise their supervisory power. The Defendant/Appellant contends that in this instance that the affirmation by the United States Court of Appeals for the Sixth Circuit is in conflict with other United States Court of Appeals decisions and is in conflict with decisions issued within the United States Court of Appeals for the Sixth Circuit.

Defendant/Appellant contends that this is a sufficient statutory basis to confer jurisdiction upon this Court to allow the Writ.

RELATIVE CONSITUTIONAL PROVISIONS, TREATISES, STATUTES AND ORDINANCES AND REGULATIONS

U.S.C.A. Const. Amend 4: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 28, 2005, Special Agent Bryan Freeman (hereinafter "SA Freeman") of the Tennessee Bureau of Investigation appeared before McMinn County Criminal Court Judge Bebb to apply for a search warrant of the Defendant's residence at 1484 County Road, Niota, Tennessee.

As a basis for the search warrant, the application and affidavit of SA Freeman outlined his experience in drug crimes, and his general knowledge that "drug dealers" have weapons and drugs in their homes. SA Freeman outlined a September 2005 conversation with a confidential informant (hereinafter "CI") who stated he knew Cornell P. Gunter and could purchase cocaine from him. On September 22, 2005, SA Freeman and other agents met with the CI and overhead a phone conversation the CI made to the Defendant where arrangements were made for the CI to purchase cocaine. The CI was outfitted with a non-recording transmittal device and money to follow through with the purchase. The CI then drove to Harper Johnson Road in Athens, Tennessee, where the agents listened while approximately two ounces of cocaine was sold to the CI by the Defendant.

On September 27, 2005, SA Freeman and other agents again listened to a phone call between the CI and the Defendant. The CI was outfitted with another non-recording transmittal device and money to purchase drugs. SA Freeman followed the CI to Athens, Tennessee. Observations by Task Force Agents (TFA) Mike Hall and Sam McNeeley of 1484 County Road, 250, Niota, Tennessee, were ongoing in

the same time period. At the Niota residence a black male (later identified to be Mr. Gunter by an unknown party) was observed entering the driveway in a dark colored Cadillac. The automobile "remained at the residence for two to three minutes and then exited the premises."[1]. The Cadillac driven by the Defendant was then followed to a house on Harper Johnson Road in Athens.[2] Subsequent surveillance of another location on Harper Johnson Road in Athens yielded a meeting between the CI and the Defendant. The agents listened to the meeting where Mr. Gunter distributed approximately two ounces of cocaine to the CI.

Based on the information within the affidavit, the search warrant was signed and executed upon Mr. Gunter's house. The warrant ultimately yielded cocaine, a firearm, and money.

On December 13, 2005, an indictment was returned from the grand jury in the Eastern District of Tennessee charging Mr. Gunter with the principle offenses of possession with intent to distribute more than five grams of cocaine and possession of a short-barreled shotgun in furtherance of a drug trafficking crime, under 21 U.S.C. 841(a)(1) and (b)(1)(B) and 18 U.S.C. 924 (c)(1)(B)(i).

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[1] The application and affidavit give no indication that any person ever exited the vehicle or entered the residence in Niota.

[2] The application and affidavit give no indication that any person ever exited the vehicle or entered the residence on Harper Johnson Road in Athens.

On March 27, 2006, the initial Motion to Suppress was filed on behalf of Mr. Gunter in the United States District Court for the Eastern District of Tennessee alleging the confidential informant against him was not a reliable source and that the search warrant against his house was not based on proper probable cause. The Motion to Suppress was denied by the magistrate on April 18, 2006. A timely objection to the magistrate's Report and Recommendation was filed on May 2, 2006. On August 14, 2006, the trial judge issued a Memorandum and Order adopting the magistrate's Report and Recommendation.

Mr. Gunter entered a guilty plea which reserved his ability to appeal the specific issues raised in his Motion to Suppress on September 29, 2006. He was then sentenced on February 22, 2007, with sentences of 120 months on counts 3 and 4 to be served consecutively, for a total effective commitment to the Bureau of Prisons for 240 months.

On February 20, 2008, the United States Sixth Circuit Court of Appeals affirmed the ruling of the trial court. The Sixth Circuit found that the confidential informant in this instance was deemed reliable through his ability to conduct controlled buys with the Defendant. The Sixth Circuit further found that a nexus between Mr. Gunter's drug dealing and his residence was established through the information of SA Freeman in the search warrant application attesting to his experience in investigating drug crimes and the well-known fact that drug dealers are reasonably known to keep drugs in their residence. Finding probable cause on the search warrant, the Sixth Circuit did not approach the issue of good faith.

ARGUMENT AND AUTHORITY TO SUPPORT GRANTING A WRIT OF CERTIORARI

Pursuant to Rules of the Supreme Court, Rule 10 it is provided that:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

It is the defendant's contention that this Petition for Writ of Certiorari should be allowed on the following basis: (1) that both the District Court and the Circuit Court of Appeals for the Sixth Circuit in determining that a sufficient nexus exists between the items to be searched for and the place to be searched is in conflict not only with another United States Court of Appeals, but that there are conflicting decisions concerning this point within the United States Court of Appeals for the Sixth Circuit, including United States v. Frazier, 423 F.3d 526 (6th Cir. 2005) and United States v. Hython, 443 F.3d 480 (6th Cir. 2006). Frazier and Hython take up the issue that in viewing

a search warrant upon a motion to suppress for lack of probable cause, the Court must look to the four corners of the warrant itself and no further to determine whether or not a sufficient nexus existed between the items to be searched for and the place to be searched.

In Frazier, a separate panel of the Sixth Circuit addressed a drug case in which the case agent sought six different search warrants, one of which was for the defendant's home. See Frazier at 530. The magistrate instructed the officer to include in the affidavits information that two of the buys by the confidential informant had been recorded. See Id. at 530. For reasons not explained, the agent made changes to five of the warrant applications, but not to the one for defendant's home. See Id. at 530. In reviewing the affidavit as submitted, the court found that it was insufficient to establish probable cause. See Id. at 532-33. However, the panel held that the search was saved by the good-faith exception of United States v. Leon. See Frazier at 534. While noting that United States v. Laughton held that "the good faith exception to the exclusionary rule does not permit consideration of information known to a police officer, but not included in the affidavit, in determining whether an objectively reasonable officer would have relied on the warrant", the panel decided that "we interpret the holding in Laughton as limited to answering the question that this court, sitting en banc, explicitly left open in Carpenter" (where the Court determined there must be a nexus between criminal activity and the item sought in search). See Frazier at 534-35, citing United States v. Laughton, 409 F.3d 744, 751-52 (6th Cir. 2005) and United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004). In other words, because this

case did not involve information that wasn't presented to the magistrate, the rule did not apply. The reason for the exception is the panel's perception that the agent's failure here didn't amount to anything more than "a scrivener's error". See Frazier at 535.

In justifying its decision, the panel noted,

> "[W]e are unable to envision any scenario in which a rule excluding from the Leon analysis information known to the officer and revealed to the magistrate would deter police misconduct. ... Because a judge's initial probable cause determination is limited to the four corners of the affidavit, (citation omitted) an officer has no incentive to exclude from the affidavit information that supports a finding of probable cause only to reveal this information to the magistrate by parole."

See Frazier at 535.

This explanation betrays a naivete about the realities of the search warrant process and challenges thereto. The concern is not so much about whether the officer will supplement the facts with oral information at the time he applies for the warrant, but whether he will lie about what information he knew and/or conveyed to the magistrate when he is later challenged in a suppression hearing. This would be the reason that a written application is required in the first place – so that one would know later exactly what (and no more!) was presented to the magistrate. To allow parole evidence to supplement the written application throws the process open to widespread abuse. And, as

the Laughton panel noted, to allow into evidence proof of what was in this officer's mind, but not reduced to writing, is inconsistent with the Leon "reasonable officer" test, which is based on the four corners of the affidavit. (citations omitted)

Mr. Gunter alleges that Frazier has little application outside of the unusual and unique factual circumstances on which it is based. The fact that it involved a "scrivener's error" and that the information was included in the other five warrants will rarely, if ever, be repeated. In Mr. Gunter's case, there is nothing in the record showing probable cause information was omitted from the search warrant affidavit. His case is distinguishable from Frazier by the fact that the Magistrate is not allowed to jump to conclusions through the reading of the warrant. Specifically, the only tie between Mr. Gunter's residence and any alleged controlled buys is the notation within the search warrant that Mr. Gunter's car stopped shortly in the driveway before he was recorded in a drug deal at another location. One cannot, and may not, read into the warrant that Mr. Gunter exited his vehicle to obtain drugs. The warrant simply does not say that, and makes no connection or any other reference between drug dealing and Mr. Gunter's house. The Sixth Circuit made this very assumption as shown on page 8 of its ruling:

> This visit provided a neutral magistrate with a substantial basis to conclude that the Defendant may have stopped at his residence to pick up some of his merchandise before meeting his customer at another location. This evidence, combined with the affiant's statements that he

> has significant experience in narcotics investigations, is sufficient to establish a nexus between Defendant's illegal activities and his residence.

The Sixth Circuit's ruling in Frazier should not be taken as an open invitation to supplement search warrant applications with inferences or even oral evidence that bolsters an otherwise weak affidavit, especially where that information was not even told to the issuing magistrate at the time of the application for the warrant. This would seem to be confirmed by the Sixth Circuit's decision in United States v. Hython, 443 F.3d 480 (6th Cir. 2006). In that case the district court found the search warrant deficient as being stale, but further found that the Leon good faith exception applied and denied the motion to suppress. The Court of Appeals held that despite the occurrence of a single controlled buy at the residence, the lack of recent information to measure whether or not the residence was a fixed drug distribution point rendered the warrant insufficient. It went on to hold that in determining good-faith reliance by the officer, a court can only consider the information in the four corners of the document. The limited exception in Frazier did not apply here to the inference that a recent controlled buy indicates that more drugs will be found in the location as there was no proof in the record that the magistrate knew or was told when the controlled buy took place.

The Sixth Circuit has no clear, static rule for when probable cause is determined only through the four corners of the warrant, as in Hython, or when the Magistrate may use oral supplementation (or

inferences, as in Mr. Gunter's case) to determine probable cause as the Court found appropriate in Frazier.

How strongly must a person's residence be tied to criminal activity to validate probable cause for a search warrant? At least three of our sister circuits have held in cases involving drug traffickers that "observations of illegal activity outside of the home can provide probable cause for the issuance of a search warrant." See United States v. Thomas, 989 F. 2d 1252, 1254 (D.C. 1993) (per curiam) Accord United States v. Williams, 974 R 2d 480, 481-82 (4th Cir. 1992)(per curiam) (upholding magistrate judge's determination of probable cause even though affidavit did not contain any facts indicating drugs were located at drug dealer's residence); United States v. Angulo-Lopez, 791 F. 2d 1394, 1399 (9th Cir. 1986)(despite affidavit's lack of direct evidence, probable cause existed to search defendant's residence based on reasonable inference that suspected drug dealer would keep incriminating evidence at his residence).

At the other end of the spectrum, the Tenth Circuit has held differently from the law of their sister circuits. The Tenth Circuit has upheld that there must be a sufficient nexus between the place to be searched and the items to be seized. See United States v. Hargus, 128 F. 3d 1358, 1362 (10th Cir. 1997). The Tenth Circuit has provided that the issuing magistrate judge "may draw reasonable inferences from the material provided in the warrant application." See United States v. Rowland, 145 F. 3d 1194, 1205 (10th Cir. 1998). However, the Tenth Circuit in contrast to other Circuit Courts of Appeals has not ever held that

"the mere observation of repetitive illegal drug activity outside a suspect's residence by itself is sufficient to establish probable cause for a search of the suspect's residence." See United States v. Nolan, 1999 F.3d 1180, 1183 (10th Cir. 1999). Further, the Tenth Circuit in Rowland, at 1204 emphasized that "probable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead there must be additional evidence linking the person's home to the suspected criminal activity."

More important to supporting the contention that the Court should allow the writ in this instance is the statement of the Court in Nolan, at 1184 as follows:

> Given the state of the law in our circuit and the differences of opinion it elicits, this panel chooses not to decide in this instance whether the affidavit in support of the search warrant was sufficient to sustain the magistrate judge's finding that incriminating evidence would likely be found inside Defendant Nolan's residence. Instead, we exercise our discretion to decide this case under the good-faith exception to the exclusionary rule established in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and leave for another day the probable cause inquiry. (emphasis added)

In addition to his argument that the Sixth Circuit lacks a clear line defining the parameters of inquiry in a four-corners search warrant analysis for probable cause, the language in Nolan makes it clear that there is a split in the circuits in determining the probable

cause inquiry. The Gunter opinion, when compared with other Sixth Circuit decisions, Tenth Circuit Decisions and other sister courts proves that there is conflict between the circuit courts concerning when there is a sufficient nexus existing between the items to be seized and the place to be searched. This is sufficient to allow the Writ of Certiorari in this matter pursuant to Rule 10 of the Rules of the Supreme Court.

CONCLUSION

WHEREFORE, defendant Cornell P. Gunter respectfully requests based upon the arguments alleged herein that his Petition for Writ of Certiorari be allowed.

Respectfully submitted,

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